

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of)	CC Docket No. 96-98
1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

COMMENTS OF COX COMMUNICATIONS, INC.

COX COMMUNICATIONS, INC.

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SUMMARY

The Commission should not modify the existing “pick and choose” rule. While ILECs generally do not negotiate on substantive issues today, changing the rule will not increase ILEC incentives to engage in real negotiations. The current rule, however, allows CLECs to avoid unnecessary costs by permitting them to take advantage of the results of arbitration proceedings. Modifying the rule would eliminate this opportunity without any countervailing benefit.

Relying on statements of generally available terms (“SGATs”) will not protect CLECs from ILECs that refuse to negotiate. In general, existing SGATs are inadequate because they are unchanged since they were filed and were not given sufficient scrutiny after they became irrelevant to the Section 271 process. There is no reason to believe that ILECs or state commissions will update SGATs. Even if they do, any SGAT rapidly will become obsolete. Because updating SGATs would be a resource-intensive, near-continuous task, it is impractical to expect that regulators, CLECs and even ILECs would be willing to undertake it.

If the Commission modifies the pick and choose rule, it should seek to maintain the advantages of the current rule. It can do so by making only limited changes. First, it should require a current, approved SGAT to be in place before any CLEC’s pick and choose rights are limited. Then, where a current, approved SGAT is in place, a CLEC should be permitted to substitute any *arbitrated* section for the corresponding section of any available agreement, *i.e.* the SGAT, another adoptable Section 252(i) agreement and the ILEC’s standard interconnection agreement. Finally, if an ILEC can prove that adoption of an entire section would be unduly burdensome, it should be permitted to limit adoption to the specific arbitrated provision(s) or segment(s) of the agreement. This rule would balance the needs of CLECs with ILECs’ legitimate concerns.

TABLE OF CONTENTS

	Page
Summary	i
I. Introduction.....	1
II. The Pick and Choose Rule Should Be Retained.....	3
III. Reliance on Statements of Generally Available Terms Will Not Protect CLECs from Unreasonable Terms and Conditions.	6
IV. If the Commission Determines that the Pick and Choose Rule Should Be Modified, the Changes Should Maintain the Ability of CLECs to Obtain Any Arbitrated Terms.....	8
V. Conclusion	11

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COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits its comments in the above-referenced proceeding.¹ For the reasons described below, the Commission should not modify the "pick and choose" rule. If, however, the Commission determines that the current rule should be modified, certain minimum safeguards should be adopted to prevent ILECs from abusing their negotiation powers.

I. Introduction

Cox is one of the leading facilities-based CLECs in the United States. As of this writing, Cox provides service to more than 840,000 residential customers and thousands of business customers in eleven markets across the country. Cox currently is the twelfth-largest U.S. telephone company, and its telephone business has grown 45 percent in the last year.

¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36, CC Docket Nos 01-338, 96-98, 98-147 (rel Aug. 21, 2003) (as context requires, the "Notice" or the "Triennial Review Order")

Since the enactment of the 1996 Act, Cox has negotiated, arbitrated or adopted more than 40 interconnection agreements to enable it to serve its customers. As part of that process, Cox has evaluated literally hundreds of agreements from all of the major incumbent local exchange carriers ("ILECs"). This experience informs Cox's comments and recommendations in this proceeding.

Cox opposes any change in the current pick and choose rule because it continues to serve a useful purpose: granting CLECs the flexibility to implement their business plans by adopting only those provisions from approved agreements that are relevant to their intended operations.² Unlike ILECs, whose resources seem limitless, CLECs generally have difficulty investing the time and expense needed to arbitrate interconnection agreements. Adopting relevant contractual provisions from existing agreements is a far more efficient and effective means for CLECs to employ for obtaining acceptable terms and conditions.

Cox's experience is that ILECs, in general, do not actually negotiate on any issues of substance, and never have done so. What differentiation there is between agreements exists almost entirely because of arbitrations. There is no reason to believe that any change in the rules will alter ILEC behavior, as ILEC incentives have not changed since the Commission's *First Local Competition Order*.³ Instead, CLECs that cannot afford to arbitrate will find themselves unable to obtain favorable interconnection terms at all.

It would be senseless to deny a CLEC the benefit of an arbitration by imposing a requirement that the entire resulting agreement must be adopted when only portions would satisfy that CLEC's business plans. Such a result would constitute an enormous waste of the

² 47 C.F.R. § 51.809

³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499 (1996) (the "*First Local Competition Order*")

time and resources expended by state commissions and parties in arbitrating an agreement. Such a requirement could act as a “poison pill,” in that one provision of an arbitrated agreement could operate against the interests of the adopting CLEC, making it impossible to adopt the agreement even though all the other provisions would be acceptable. There is no good reason to keep such a CLEC from excluding that one provision from its adoption of the balance of the agreement. Indeed, logic dictates that the value created by state commissions and the parties to arbitration proceedings should be preserved by making the adoption process as flexible as possible, rather than establishing requirements that could reduce and destroy that value.

If the Commission nevertheless modifies the current pick and choose rule, it should ensure that ILECs cannot abuse their position. In particular, CLECs should be permitted to adopt whole sections of arbitrated interconnection agreements (such as the UNE provisions or the collocation section) if those sections were subject to arbitration. This “whole section” adoption could be further limited to smaller subsets of arbitrated terms if the ILEC can demonstrate that such limits are necessary. Moreover, this limitation on pick and choose rights should be permitted only when there are interconnection agreements or statements of generally available terms (“SGATs”) that contain state-approved rates and terms that cover all of the ILEC’s obligations under Section 251, consistent with the most recent FCC rules.

II. The Pick and Choose Rule Should Be Retained.

When the Commission adopted its initial local competition rules in 1996, it analyzed the incentives of ILECs to negotiate interconnection agreements in light of the requirements of the 1996 Act. The Commission concluded that ILECs had little or no reason to negotiate with CLECs:

[T]he requirements in section 251 obligate incumbent LECs to provide interconnection to carriers that seek to reduce the incumbent’s subscribership and weaken the incumbent’s

dominant position in the market. Generally, the new entrant has little to offer the incumbent. Thus, an incumbent LEC is likely to have scant, if any economic incentive to reach agreement.⁴

Nothing has happened in the last seven years to change that conclusion. Indeed, experience has demonstrated that, except for the most trivial issues, ILECs in general and the Bell companies in particular, are unwilling to negotiate the terms of interconnection with CLECs.

Cox's own experience bears this out. In negotiating with Bell companies, Cox generally is presented with a proposed agreement drafted by the Bell company. Any request for substantive change to the ILEC's template is rejected out of hand. There is no give and take, no "horse trading" and no real negotiation. If Cox deems a particular provision of the agreement to be unacceptable, there is little Cox can do in the negotiation process because the ILEC is unwilling to change. ILECs resist even when they propose terms that explicitly conflict with the Act and the Commission's rules. For instance, in the Commission's Virginia arbitration proceeding, Cox was required to arbitrate, among other things, Verizon's demand that Cox provide Section 251 collocation to Verizon.⁵

Taking issues to arbitration is expensive, time-consuming and uncertain.⁶ For instance, in Cox's current arbitration proceeding in Oklahoma, SBC is demanding that superfluous rates, terms and conditions covering numerous subloop arrangements be approved for inclusion in an agreement under arbitration even though Cox seeks to use only one of these arrangements and

⁴ *Id.* at 15570

⁵ *Petitions of WorldCom, Inc. et al. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, 27078-9 (*"Virginia Arbitration Order"*)

⁶ For instance, Cox began negotiating a new interconnection agreement for Virginia with Verizon in 1999. The agreement went to arbitration in April, 2001, a decision was issued in July, 2002, and Verizon's request for reconsideration of the decision remains pending today. The arbitration itself required Cox and outside counsel to participate in, among other things, extensive discovery, a two-week hearing, multiple motions, two rounds of pleadings on the merits and two rounds of pleadings on reconsideration. *See id.* at 27045-8.

has opposed the others as irrelevant.⁷ The reason for this behavior appears to be that SBC hopes to force other CLECs to accept these extraneous subloop arrangements once the Oklahoma Commission “approves” them, even though Cox lacks the direct interest in them to assure cursory analysis, much less vigorous opposition.

Where possible, Cox addresses this dilemma by using the pick and choose rule. In nearly every state, several parties have arbitrated agreements, and each arbitrated agreement is different. These differences arise because carriers’ needs vary. Facilities-based carriers are most concerned with interconnection; UNE-P providers focus on the terms for UNEs; and DSL providers arbitrate the provisions most important to offering data services. In practice, no one arbitrated agreement contains terms that are ideal for most other carriers. Cox has found, for instance, that in some states AT&T seeks certain terms for UNEs that are consistent with Cox’s needs, while WorldCom’s terms for physical interconnection are more suitable than those usually obtained by AT&T. Because there is such variation among arbitrated agreements, Cox can use the pick and choose rule as an efficient mechanism to craft interconnection arrangements that meet Cox’s requirements, without the expense of arbitrating each agreement. Without the pick and choose rule, Cox would be forced back into the dilemma of accepting the ILEC’s first (and only) offer or arbitrating each agreement.⁸

Moreover, there is no reason to believe that ILEC incentives would improve if the current pick and choose rule were modified or eliminated. Under the current rule, ILECs are aware that

⁷ Application of Cox Oklahoma Telcom, L.L.C., for Arbitration of Open Issues Concerning Unbundled Network Elements, Cause No. PUD 200300157, filed with the Corporation Commission of the State of Oklahoma (“Oklahoma Commission”) on March 24, 2003 (“*Oklahoma Arbitration*”).

⁸ It is worth noting that, under current policies, CLECs are required to accept all “legitimately related” terms when they invoke their pick and choose rights. *First Local Competition Order*, 11 FCC Rcd at 16139. Thus, to the extent that an ILEC has agreed to accept a specific CLEC requirement in return for obtaining a concession from the CLEC, it is protected and has the right to demonstrate the connection between the terms to the relevant state commission.

CLECs have some options if negotiations fail, in that CLECs can adopt language from multiple agreements without arbitration. This creates some incentive for the ILECs to consider negotiating. In the absence of the rule, however, even that slim incentive to negotiate would be eliminated. The ILEC will know that the CLEC has no opportunity to craft an agreement that meets its specific needs via pick and choose, and will be forced to choose among existing full agreements (including, potentially, an obsolete SGAT) or to arbitrate every open issue. Moreover, from a business perspective, ILECs already have little or no incentive to agree to different terms with different carriers, because they understandably prefer uniformity.⁹

In this context, there would no incentive at all for any ILEC to negotiate a special arrangement for individual carriers, and it is unlikely that any ILEC would do so. In other words, the pick and choose rule is the best way to give CLECs an opportunity to obtain interconnection on the terms and conditions most suited to their businesses.

III. Reliance on Statements of Generally Available Terms Will Not Protect CLECs from Unreasonable Terms and Conditions.

In the *Notice*, the Commission seeks comment on the possibility of eliminating pick and choose obligations in states where an approved SGAT is in place.¹⁰ Such a determination would be unwise.

Under the Communications Act, SGATs were intended to serve a specific function, which was to provide a path for Bell companies to obtain long distance authority in states where

⁹ Indeed, Verizon specifically argued in the Virginia arbitration proceeding that it should not be required to adopt different interconnection terms for some carriers than for others. Petitions of WorldCom, et al., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, CC Docket Nos. 00-218, 00-249, 00-251, Hearing Transcript at 44.

¹⁰ *Notice*, ¶ 725. The *Notice* also asks for comment on the authority of the Commission or the states to require non-Bell companies to file SGATs. *Id.*, ¶ 727. Since the SGAT provision appears in Section 271 of the Communications Act, it is limited to Bell companies. It is unclear how it could be applied to independents, including the former GTE operating companies that are now part of Verizon.

local telephone competition did not develop. The SGAT provision comes into play only when the actual competition prong of the initial test under Section 271(c)(1) is not met. 47 U.S.C. § 271(c)(1)(B).

In practice, of course, there is actual competition in every state served by a Bell company. As a consequence, while many Bell companies filed SGATs, few if any have been updated since the initial filings. At the same time, many SGATs never were approved by state regulatory authorities, typically because they were irrelevant both to the Section 271 process and to actual CLEC interconnection. Even where SGATs once were approved, any amendments to conform to later Commission and court rulings typically have not been reviewed by state regulators. For example, the Oklahoma Commission approved an SGAT in 2000, referred to as the “O2A,” but had no opportunity to examine its applicability to subloop arrangements until Cox submitted the matter for arbitration in the spring of this year.¹¹ The Oklahoma Commission did not have this opportunity even though the FCC determined in 1999 to add subloops to the list of UNEs. Simply put, it is unlikely that more than a handful of the SGATs that were filed include suitable terms for interconnection that complied with the Commission’s rules prior to the *Triennial Review Order*, let alone terms that comply with the current rules.

In addition, many of the SGATs that were approved were subject to only cursory review. Indeed, many of them arose in the context of Section 271 proceedings that focused on other issues. Because they often were viewed as optional back-ups to interconnection agreements, there was little reason for regulators to treat them as anything but a formality. For that reason, they often contain terms and conditions that reflect only the ILEC’s interests, not those of competing CLECs.

¹¹ See *supra* text accompanying n.7.

Moreover, this is unlikely to change. Even assuming that states would be inclined to conduct one-time proceedings to bring SGATs up to date, the Commission's rules and the interpretations of those rules are in constant flux, and an SGAT approved now likely will contain terms that do not comply with the law within several months. Maintaining an up-to-date SGAT would be resource-intensive, near-continuous task that would unreasonably burden state regulators, CLECs and even ILECs.¹² It would be impractical to expect that regulators or any other party would be willing to meet that burden.

It also would be unrealistic to rely on a generic proceeding to determine such important rights and obligations. Because almost all CLECs have current interconnection agreements, few (if any) would have a direct and immediate interest in such a proceeding and the outcome. Most would be unlikely to participate, saving their resources for issues that affect them immediately. This would be a rational business decision for any CLEC with a current agreement, but it could lead to SGATs that are not fully scrutinized.

IV. If the Commission Determines that the Pick and Choose Rule Should Be Modified, the Changes Should Maintain the Ability of CLECs to Obtain Any Arbitrated Terms.

As explained above, there are important reasons for the Commission to retain the current pick and choose rule. However, to the extent the Commission believes modification is necessary, it should seek to maintain the advantages of the current rule. It can do so by adopting narrower limitations on the ability of a CLEC to pick and choose the provisions it wants.¹³

¹² Indeed, the resource costs of maintaining terms that comply with the rules may explain why the Bell companies have not kept their SGATs up to date.

¹³ Cox does not express any opinion concerning the Commission's ability to reinterpret Section 251(i) to limit CLECs' pick and choose rights. See Notice, ¶ 728.

First, before any limitations can be placed on a CLEC's pick and choose rights, there should be a current, approved SGAT for the relevant ILEC in that state. A current SGAT would be one that complies in all respects with the most recent Commission rules in effect on the date negotiations begin, as determined by the state commission. An approval process at the state level is critical – an SGAT, including any amendments, should not be deemed to comply with current rules unless the state commission has reviewed it and affirmatively concluded it is compliant.

This threshold requirement is necessary because, as discussed above, there are few SGATs that comply even with the *UNE Remand Order*, let alone with the *Triennial Review Order*.¹⁴ It would be inappropriate to rely on SGATs that reflect the rules that were put in place six or seven years ago.

Second, even if an SGAT is in place, CLECs should continue to be permitted to invoke their pick and choose rights as to arbitrated sections of interconnection agreements (“sectional adoptions”). For instance, a CLEC should be permitted to substitute any *arbitrated* collocation section for the collocation section in any agreement available for adoption, including the SGAT, another adoptable Section 252(1) agreement and the ILEC's standard interconnection agreement. This limited pick and choose right would apply only to whole sections of an agreement, such as UNE sections, resale sections and physical interconnection sections.¹⁵

¹⁴ See *supra* text accompanying n.11. It is likely that every existing SGAT will have to be amended to comply with the Commission's clarifications concerning the availability of the inside wire subloop. *Triennial Review Order*, ¶¶ 351-8.

¹⁵ That is, the CLEC could not adopt only the provisions related to switching or two-wire loops, but would have to take the entire UNE provision from an agreement that was subject to arbitration. While the CLEC could not take a section that had not been arbitrated, it could take an entire section if part of the section had been adopted in an arbitration proceeding.

This rule would allow all CLECs to benefit from the results of any arbitrations in their states, without forcing them to go through the arbitration process themselves. Such a rule would be particularly valuable to smaller CLECs, which lack the resources to arbitrate even small sections of an agreement, and which otherwise might be forced to accept ILEC terms on a take it or leave it basis. To the extent that ILECs have any incentive to negotiate special arrangements with particular carriers, this rule would not eliminate that incentive, because such negotiated sections would not be subject to pick and choose. The only effect of the provision would be to prevent ILECs from forcing CLECs to arbitration on issues that already have been decided.¹⁶

Finally, to the extent that an ILEC can prove to a state commission that permitting CLECs to adopt an entire section of an arbitrated agreement is burdensome, the state commission should be allowed to limit the adoption right to the specific arbitrated provision or segment, such as EEL or transiting language ("segment adoption"). Thus, if the ILEC can demonstrate that a segment should be separated from the remainder of the agreement, the state commission can determine that, in that particular case, CLECs are entitled only to the arbitrated language (and legitimately related terms, such as prices), not the entire UNE or interconnection section. This will protect ILECs in the rare circumstances when they have negotiated a custom arrangement for part of a section and arbitrated another part.

Cox emphasizes that it does not believe there is any reason to change the current rule because there is no evidence that ILEC incentives to negotiate would be improved by any modifications the Commission could adopt. Nevertheless, to the extent that the rule is modified,

¹⁶ This is not a frivolous concern. As described above, in the Virginia arbitration proceeding, Verizon insisted on arbitrating the question of whether it was entitled to collocation at CLEC switches, even though it was clear that ILECs have no such rights under the rules. *Virginia Arbitration Order*, 17 FCC Rcd at 27078-9. Similarly, in the *Oklahoma Arbitration*, SBC insists that intermediary box arrangements be included in the agreement even in light of the Commission's finding that CLECs cannot be forced to use them. *Triennial Review Order*, ¶ 358.

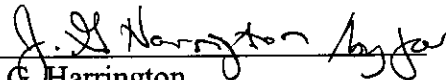
Cox submits that its proposal would limit the potential harm of changing the rule while maintaining as many benefits of the current regime as possible.

V. Conclusion

For all these reasons, Cox Communications, Inc., respectfully requests that the Commission retain its current pick and choose rules. If any change in these rules is deemed necessary, the Commission should alter the rules in accordance with these comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a legal secretary at Dow, Lohnes & Albertson, PLLC do hereby certify that on this 16th day of October, 2003, copies of the foregoing Comments of Cox Communications, Inc. were served by hand-delivery to the following:

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